(1) 89-1014

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. _____

C.W.Mc PHERSON and
NORMA McPHERSON, Petitioners

vs.

A.L. BARNES, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

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(5 pp)

QUESTIONS PRESENTED FOR REVIEW

This cause presents the following questions of interest and importance which warrant and necessitate the attention of this Court, to-wit:(The case was a judge tried case without a jury).

A. The decision of the Eighth Circuit Court of Appeals in regard to reliance and causation under Section 12(2) of the Securities Act of 1933 which relates to omissions of material facts in the offer and sale of stock in essence eliminates these elements from the proof requirements and makes it impossible to defend in the present case wherein the District Court, prior to direction by the Court of Appeals had found "there is no to link any conduct on defendants' part with plaintiff's decision initially to purchase", and "there is insufficient evidence to connect any conduct on the

part of defendants with plaintiff's decision to purchase" and "it is clear that these misrepresentations/omissions were not crucial, in the least, to plaintiff's investment decisions" and "There is insufficient evidence to show that plaintiff either relied on these misrepresentations/omissions or that there existed in any way a causal connection between defendants' misconduct amd plaintiff's purchases" (The quoted portions are quoted directly from the original opinion of the District Court).

B. The Opinions of the Court of Appeals has stretched the definition of "controlling persons" to the point where in this case the petitioner Norma McPherson, the wife of petitioner, C.W.McPherson, has been determined to be a controlling person even though she in essence had nothing to do with the entire

situation which was the basis of this litigation and in fact in this situation the plaintiff had far greater control than Norma McPherson, and the findings of the trial court and the court of appeals were contrary to the factual findings of the District Court which were "While there is not a great deal of evidence to show that Norma McPherson participated in the operations of the corporation other than her signature on a Fearon stock certificate and her attendance at Fearon stockholder meetings, there was no evidence produced at trial to rebut the inference of her participation.**her status as a director** establishes a prima facie showing that she was a controlling person.** While it appears that Mrs McPherson probably did not influence the direction of the corporation to the extent that her

husband did, the fact that she was a director and an active officer of Fearon suggests that she probably could have altered the direction of the management and policies of the company". From this it is clear that the interpretation of "controlling person" has improperly shifted the burden of proof from the plaintiff who to makes the claim to the defendant and now requires the defendant prove the negative, which like point A above makes it essentially impossible to defend and in reality "controlling person" has been replaced by "officer or director" in the statute.

C. The petitioners had in the original pleadings raised the defense of the relevant statutes of limitations, however, since the District Court originally found in favor of petitioners on all 21 of the original counts there

was no decision on this point,however, on the original appeal the trial court's decision was affirmed in part and remanded in part. On remand the District Court did not rule on the issue of the statute of limitation and this point was raised in the current appeal to the Court of Appeals and the Court of Appeals made its own findings of fact and concluded that the statutes of limitation did not bar plaintiff's claims. Petitioners suggest that the findings of fact by the Court of Appeals on this point are contrary to the evidence in that the suit was filed July 1,1983, the contracts involved were concluded prior to July 1, 1981, the facts were discovered prior to July 1,1981, and the plaintiff testified "I knew I was defrauded *** late November 1981" which would clearly bar the counts where the one year statute

applies,however, the Court of Appeals tolled the statutes until August 1982; it is further suggested that the opinion of the Court of Appeals in finding that Barnes exercised due dilligence made a finding unsupported by the evidence in that there was no evidence whatsoever to indicate any dilligence on the part of Barnes and in fact instead of dilligence the evidence was replete with testimony by Barnes which clearly indicated that his greed and desire to participate in the profits and participate in the operation itself rather than as an investor completely negatived any dilligence on his part and he was in fact a participant rather than a victim. It is suggested that the case should have been remanded to the District Court which had heard the testimony for determination of the facts and a decision on the factual

basis of the determination on the limitations issue since in this case a factual dispute existed regarding when the contract was completed, whether dilligence was exercised and the factual basis for any tolling of the statute. These questions were crucial and could have been dispositive of the case in its entirety. In essence the petitioners have been deprived of a fair trial and appeal for the reason that the district judge who heard the evidence did not make a finding of fact or law on this crucial issue, but another set of judges who did not hear the evidence and have a chance to make the usual observations a trial judge or jury would make have made a decision regarding the facts and the law leaving petitioners without an appeal other than to the judges who have made the findings of fact and conclusions of

law.

D. The opinion of the Court of Appeals incorrectly indicates a finding in favor of Barnes on Count 20 (common law fraud), for the reason that the opinion of the District Court indicates to the contrary.

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St Louis Shipbuilding etc v. Director etc ,551 F 2d 119(8th Cir 1977)

Tenneco Chemicals,Inc v William T Burnett & Co;, 691 F 2d 658 (4th CCA) (1982).

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Gordon v Burr,506 F.2d 1080 (2ndCir 1974)

Christoffel v. E.F.Hutton & Co,588 F.2d 665 (9th Cir 1978)

IN THE

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C.W. McPHERSON, and NORMA McPHERSON, Petitioners	)	
	)	No. _____
vs	)	
A.L.BARNES, Respondent	)	

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT

TO:THE HONORABLE, THE CHIEF JUSTICE and ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

C.W.McPherson and Norma McPherson,the petitioners herein,pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals, Eighth Circuit, entered in the above entitled cause, on July 31,1989. Petitioners' Motion for Rehearing was denied and the mandate issued on September 20,1989.

OPINIONS BELOW

The opinions of the United States Court of Appeals, Eighth Circuit are cited as Barnes v. Resource Royalties, Inc., 610 F.Supp. 499, and as Barnes v. Resource Royalties,Inc., 795 F.2d 1359 (8th Cir. 1986); on remand slip op. 83-1582 (E.D. Mo.November 19,1987), and the current opinion of the Eighth Circuit, copies of all of which are attached hereto as Appendix A,B,C and D.

JURISDICTION

The judgment of the United States Court of Appeals, Eighth Circuit, filed July 31,1989.

A timely Motion for Rehearing was denied and the Mandate was issued on September 20, 1989.

The jurisdicition of this Court is envoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutes involved is Section 409.411(e) of the Missouri Revised Statutes and Sections 771(2),77(m),77o and 78j(b)of Title 15 of the United States Code and Sections 12(1) and 12(2) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934.

STATEMENT OF THE CASE

The facts are set out concisely in the prior opinions of the Court of Appeals and the statement in the most recent decision is borrowed and here set forth.

This action arises out of three securities purchases made by A.L.Barnes in 1980 and 1981. Barnes filed a twenty-one count complaint against twelve defendants, including the McPhersons.

The complaint alleged breach of employment contract, common-law fraud, a RICO violaion, and several violations of federal and state securities law. The suit was eventually settled against all defendants except the McPhersons.

After a bench trial , the district court found in favor of the McPhersons. Barnes appealed to the Circuit Court of Appeals which affirmed the district court's finding of no liability as to the first transaction, but reversed and remanded for further consideration with regard to the second and third transactions and the RICO claim. On remand, the district court found in favor of Barnes on Count two,four and eight (federal securities law violations), thirteen , seventeen and nineteen (state securities law violations). The opinion of the Court of Appeals incorrectly

indicates a finding in favor of Barnes on count 20 (common law fraud).

McPhersons appealed to the Eighth Circuit Court of Appeals and said decision was affirmed.

However, since the questions relating to the statutes of limitation raised by McPhersons were not ruled on by the district court the Court of Appeals made its own findings of fact on this issue, concluding that the statutes were not violated. The Court of Appeals, by making its own findings of fact on this crucial issue has in effect eliminated a trial/appeal by petitioners on these issues.

REASONS FOR GRANTING THE WRIT

I. The judgment rendered by the Eighth Circuit Court of Appeals is contrary to decisions of this Court , and also decisions of the Eighth Circuit and

the Fourth Circuit in regard to the manner of interpreting the effect to be given to presumptions and the burden of proof in that it is suggested that the Court of Appeals has failed to give effect to the principle that although the plaintiff herein may have been entitled to a presumption regarding reliance, once sufficient evidence is offered to justify a finding of non-reliance, the presumption falls out of the case. The Court here imposed on petitioners the impossible burden of proving the negative.

The court gave the benefit of the presumption to both a misrepresentation and an omission.

II. The judgment rendered by the Eighth Circuit Court of Appeals is contrary to the decisions of the 2nd,3rd and 9th Circuits in that it has extended

the meaning of "controlling persons" to include persons who are merely officers or directors.

Further, the interpretation does not require the knowledge expressly called for by Section 77o of 15 U.S.C.

This seems clearly contrary to the statutory phrase and concerning knowledge and the decisions of the 2nd, 3rd and 9th Circuits regarding the interpretation of "controlling person".

III. The proceedings by the Eighth Circuit Court of Appeals in deciding the facts surrounding the crucial issue of the statutes of limitations without a hearing in this case where the trial court had made no findings of fact or conclusions of law in regard to this crucial issue in effect deprived the petitioners of a trial (since once court heard the evidence and another court made

the findings of fact) and an appeal to be heard by another body constituted an unacceptable departure from the accepted and usual course of judicial proceedings requires a determination by the original fact finder and the cause should have been remanded for that purpose. There were many factual issues relevant to this issue which related to when in fact the statutes started running, when the acts of defendants occurred and the diligence, if any, of the plaintiff.

ARGUMENT

I. INCORRECT APPLICATION OF THE LAW IN REGARD TO THE EFFECT TO BE GIVEN PRESUMPTIONS AND THE ULTIMATE BURDEN OF PROOF.

Briefly stated the decision of the Court of Appeals following the bench trial and after the decision by the District Court after remand in effect mandated a decision of reliance and

causation by the Court of Appeals contrary to its own decisions and decisions of this Court and the other Courts of appeals in that although the trial court clearly determined that plaintiff would not rely on anyone other than himself in making his decisions the trial court went on to say that he would not have relied on anything else since plaintiff was so dead set to get a piece of the action plus the fact that the received compensation and fringes over and above return on investment. Plaintiff was a person who made risky investments in the past and had won and lost. Even if the Court of Appeals was correct when it indicated that the trial court had not considered the presumption available when an omission occurs,it is suggested that the Court of Appeals did not give credit to

the decisions of this Court , the decisions of the Eighth Circuit and decisions of the other Circuits which require that once sufficient evidence is offered to justify a finding of non-reliance, the presumption falls out of the case. The interpretation of the Court of Appeals the impossible burden of proving the negative of reliance and causation even though it seems clear that the District Court findings indicate that it found facts which it believed which established by plaintiff himself the issues of reliance and causation in favor of petitioners. The decision and facts found by the District court were sufficient evidence and the presumption should have fallen out of the case. It is suggested that the District Court changed the result after the Court of Appeals "mandated" it.

Del Vecchio et al v. Bowers,296 U.S. 280,56 S.Ct. 190(1935);

St. Louis Shipbuilding etc. v. Director etc,551 F.2d 119, (8th Cir. 1977);

Tenneco Chemicals, Inc., v. William T Burnett & Co.,,691 F.2d 658 (4th CCA)(1982).

II. INCORRECT INTERPRETATION OF PROVISION REGARDING CONTROLLING PERSONS

It seems clear from the opinions that there was insufficient evidence to find petitioner Norma McPherson a "controlling person" and that the decisions of the Circuit Court of Appeals in this case in reality constitute a decision that all that is necessary to prove is that a person is an officer or director and that is sufficient. The evidence seems clear that she did not participate in the ordinary "operations" of the corporation and that she did not

participate in the subject transactions nor is there evidence that she had knowledge of the transactions. This interpretation seems clearly contrary to the decisions of this court and those of the other circuits. Affiliated Ute Citizens v. United States, 406 U.S. 128,92 S.Ct 1456,31 L.Ed 2d 741 (1972), Metge v. Baehler, 762 F.2d 621 (8th Cir - 1985); Rochez Brothers v Rhoades,527 F.2d 880 (3rd Cir 1975); Gordon v Burr,506 F.2d 1080,(2nd Cir 1974); Christoffel v E.F.Hutton&Co,588 F.2d 665 (9th Cir 1978); in the Metge case , the Court of Appeals indicates that its interpretation is contrary to the 2nd ,3rd and 9th circuits.

It is also contrary to the statute which expressly requires "knowledge of or

reasonable ground to believe in the existence of the facts" , Section 77o,15 U.S.C.

III. DENIAL OF TRIAL AND APPEAL REGARD THE FACTUAL ISSUES RELATING TO DEFENSES OF STATUTES OF LIMITATION.

There were extensive factual disputeS regarding the actions of plaintiff relating to the the statutes of limitation and regarding causation and reliance.

From the opinions published by the trial court and the Court of Appeals one gets the clear impression that after a bench trial wherein the trial court asked questions of the plaintiff and had the usual advantages of the fact finder , the trial court came away with factual beliefs in favor of these petitioners and against the plaintiff. However, the Court of Appeals seems to have come away with a different view of the situation and

almost says in the first opinion that if it was up to them they would have ruled the other way. What the court of appeals did do however, was to in essence mandate that the trial court find the facts differently, which it seems the trial court in fact did on the subsequent decision(without further evidence). This situation seems to have continued when the trial court failed to make findings regarding the statute of limitations. Instead of remanding the case for the trial court to make findings of fact the court of appeals made its own findings of fact. It is submitted that the findings of fact made by the Court of Appeals are consistent with their prior opinion which seemed to reflect an attitude that plaintiff should prevail.

It is suggested that the Court of Appeals in this case after reading the

record has come to the conclusion that the plaintifr should have prevailed,while the trial court's findings seem to indicate that the trial judge came to the conclusion that petitioners should have prevailed. It is suggested that the only reason the Court of Appeals came to their conclusion was that they did not hear the evidence and witness the testimony. It is suggested that the trial court came to the proper decision the first time, that the second decision which was partially in favor of the plaintiff was greatly influenced by the first mandate, and that by making its own findings of fact on the issue of the statutes of limitations the court of appeals has acted as both the trial court and the appellate court in a case where it seems that the trial judge had a different reaction to the evidence than the court of appeals and thus the

petitioners were denied either a trial or an appeal by the Court of Appeals making such findings of fact on the issues of when the statutes commenced running, when and if the statutes were tolled and what if any dilligence was shown by plaintiff and further denied petitioners to offer further evidence on these issues on remand.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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314 863 5060

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing petition was mailed this 18th day of November, 1989, to counsel for Respondent Barnes, i.e., Timothy J Vujnich, 111 West Port Plaza,Suite 717,St Louis, MO., 63146.

_____

Roger M Hibbits
Attorney for Petitioners

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

A.L.BARNES,	)	
	)	
Plaintiff,	)	
	)	
v	)	No.83-1582
	)	
RESOURCE ROYALTIES, INC., et al	)	
	)	
	)	
Defendants	)	

ORDER

IT IS HEREBY ORDERED that plaintiff A.L.Barnes as to Counts 2,4,6,8,11,13,17, and 19 of the complaint take nothing and that judgment be entered in favor of defendants C.Wallace McPherson and Norma J. McPherson with each party bearing their own costs and attorney's fees.

IT IS FURTHER ORDERED that defendants' joint motion for judgment on the pleadings be and is DENIED as untimely pursuant to Rules 12(c) and 56(c), Federal Rules of Civil Procedure

and Local Rule 7.

IT IS FURTHER ORDERED that defendant Norma J. McPherson's motion for summary judgment be and is DENIED as untimely pursuant to Rules 12(c) and 56(c),Federal Rules of Civil Procedure and Local Rule 7.

Dated this 11th day of April,1985.

MEMORANDUM OPINION

This matter before the Court is a securities fraud complaint. The complaint filed was originally a twenty-one count complaint naming twelve defendants. After a rather chaotic pre-trial period, several counts of the complaint were dismissed and plaintiff either settled with or default judgments were entered against ten of the defendants. Eventually, it was decided to proceed with the case against the only remaining defendants, C.Wallace McPherson and Norma

J. McPherson. On November 5,1984, this cause was tried before the Court on counts 2,4 and 6 involving Sections 12 and 17 of the Securities Act of 1933; Count 8 involving Section 10b of the Securities Act of 1934 and Rule 10b-5; Count II involving the Racketeer influenced and Corrupt Organization Act (RICO); and counts 13,17 and 19 involving Section 409.411 of the Missouri Uniform Securities Act(more commonly known as Missouri blue-sky laws).

The Court has jurisdiction over the parties and has subject matter jurisdiction as to counts 2,4,6,8 and 11 pursuant to 15 U.S.C. Section 77u(a),15 U.S.C. Sectioo 78aa and 18 U.S.C. 1964(a) and (c). The Court maintains pendent jurisdiction as to counts 13,17 and 19. Judgment will be entered for the defendants on all counts at issue.

Plaintiff, A.L. Barnes , is a resident of St. Louis County,Missouri. Defendant C. Wallace McPherson was an officer and a director of several corporate entities; McPherson Enterprises, Fearon Development Corporation, Pan-American Engery ,Inc.,andResource Royalties, Inc. for the years 1980,1981 and 1982. Defendant Norma J. McPherson,C. Wallace McPherson's wife, was an officer and a director of McPherson Enterprises and Fearon Development Corporation for the years 1980,1980 and 1982. Essentially, plaintiff alleges that defendants and several others involved him in a fraudulent investment scheme. Plaintiff avers that he was induced to invest substantial sums of money in defendants' corporations on the pretext that these businesses were developing new products .

Specifically ,plaintiff claims that defendants sold him unregistered securities in sham corporations.

The testimony before this Court was basically by deposition and plaintiff Barnes in person. Defendant C.Wallace McPherson invoked his rights under the Fifth Amendment and elected not to testify. The circumstances surrounding this cause of action are somewhat complicated but basically plaintiff's suit involves three securities transactions.

On or about December 1,1980,plaintiff bought, at the suggestion and through his broker, John Darling,10,000 shares of common stock of Knox-Arizona Corporation for purchase price of $.25 per share, or an aggregate purchase price of $2,500. John Darling advised plaintiff to purchase this stock

because defendant C. Wallace McPherson and Richard Laughlin were going to buy the company and Darling predicted that the stock value would then increase. Later in December 1980, Darling told plaintiff about the availability of some options to purchse more stock in Knox-Arizona. On December 30, 1980, plaintiff purchased 100,000 shares of common stock of Knox-Arizona at a purchase price of $.40 per share or an aggregate purchase price of $40,000. This purchase was pursuant to a common stock option which provided that the purchase price was to be paid in two(2) installments of $20,000 each. Plaintiff authorized Darling to withdraw $20,000 from his account with the brokerage firm (Thomson-McKinnon) on January 9,1981. Thereafter, plaintiff received through the mail a common stock option for 100,000 shares of Knox-Arizona

from the Fearon Development Corporation . At this point in time, plaintiff testified that he had no knowledge of the link between defendants, Fearon Development Corporation, and Knox-Arizona. Plaintiff also testified that the transactions were handled entirely by John Darling. Plaintiff never knew who the seller of the stock was or who received his payments for the stock.

The evidence further showed that plaintiff met defendants for the first time at a stockholders' meeting on or about January 10,1981. Plaintiff was invited to this meeting by John Darling on behalf of defendant C. Wallace McPherson. Both defendant C. Wallace McPherson and Laughlin gave speeches about the business of Fearon-Development Corporation and the need to acquire Knox-Arizona. Threafter, plaintiff acquired a

friendship with Laughlin and maintained regular contact with him.

Sometime in June, Laughlin told plaintiff that the acquisition of Knox-Arizone was not going well. Plaintiff then received a letter from defendant C. Wallace McPherson (on Fearon Development Corporation stationary) stating that instead of acquiring Knox-Arizona, Fearon Development Corporation had acquired Pan-American Energy, Inc. Shortly thereafter, defendant C. Wallace McPherson called plaintff and told him that contrary to the prior letter, Pan-American Energy was not purchased. Instead, defendant C. Wallace McPherson and Laughlin had purchased Resource Royalties, Inc., and were going to form their own Pan American Energy, Inc. Defendant C. Wallace McPherson offered plaintiff 200,000 shares of Resource Royalties at $.20 per

share in lieu of the 100,000 shares of Knox-Arizona as previously offered and sold to plaintiff pursuant to the common stock option. Plaintiff discussed the new arrangement wtih Darling and Laughlin and testified that Darling and Laughlin recommended that he exercise his option.

On or about July 1,1981, Darling called plaintiff to tell him that C. Wallace McPherson was in Darling's office awaiting payment of the second $20,000 installment on the common stock option. Plaintiff stated that he again authorized Darling to withdraw $20,000.00 from plaintiff's account. There was no evidence that plaintiff talked to defendant C. Wallace McPherson during this conversation or in any way had contact directly with him.

Plaintiff did not immediately receive a stock certificate for the

200,000 shares of Resource Royalties and the delay caused him some concern, which he expressed to Darling and Laughlin. On or aout September 10,1981, Laughlin personally delivered to plaintiff a stock certificate representing plaintiff's purchase of 200,000 shares of Resource Royalties.

The Court finds that neither the Knox-Arizona nor Resource Royalties stocks were registered as required by federal and state laws. The Court further finds that these same securities were sold without the required accompanying prospectus and no sales or advertising literature was filed with the State of Missouri prior to the sales.

The remainder of the evidence presented to the Court was primarily concerned with plaintiff's employment arrangement with defendant C. Wallace

McPherson. The Court does not find that portion of the evidence to be relevant to the cause of action as it presently stands before the Court.

The evidence indicates that on the whole plaintiff became involved and continued to be involved in the "investment scheme" through the efforts of John Darling and Richard Laughlin. The Court finds that plaintiff had minimal contact with defendant C. Wallace McPherson as regards these securities transactions and virtually no contact with defendant Norma J. McPherson. Plaintiff testified tnat he relied upon the advice and representations made by John Darling and Richard Laughlin. The evidence shows withdrawals from plaintiff's account with Thomson-McKinnon but without any indication of purpose of the withdrawals. The Court further finds

no evidence indicating the source of funds deposited into Fearon Development Corporation's bank accounts. The Court finds that plaintiff purchased his shares of Knox-Arizona through John Darling from an unknown seller. Whether the seller was defendant C.Wallace McPherson personally would be unsubstantiated speculation on the part of the Court. The Court further finds that plaintiff purchased his 200,000 shares of Resource Royalties pursuant to a common stock option issued by Fearon Development Corporation . There is no evidence that defendant C. Wallace McPherson sold these shares personally.

Firstly,plaintiff seeks to hold defendants personally liable for the sale of these securities by means of untrue statements of material fact or omissions of material fact under Section10(b) of the Securities Exchange Act of 1934, 15

U.S.C. Section 78j(b);Rule 10b-5,17 C.F.R. Section 240.10b-5 ; and Section12(2) of the Securities Act of 1933,15 U.S.C. Section 771(2). These statutes read as follows:

Section 10(b) of the Securities Exchange Act 1934 ,15 U.S.C. Section 78j(b),provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or the mails, or any national securities exchange-

(b) To use or employ,in connection with the purchase or sale of any security,registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. Rule 10b-5 implementing Section 10(b),17 C.F.R.

Section 240.10b-5 ,provides:

Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly,by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities

exchange.

(a) to employ any device,scheme,or artifice to defraud,

(b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) to engage in any act,practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security.

Section 12(2) of the Securities Act of 1933, 15 U.S.C. Section 771(2) provides in pertinent part:

Any person who-

(2) offers or sells a security .. ,by the use of any means or instruments of transportation or communication in interstate commerce or of the mails ,by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission), and who shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of such untruth or omission, shall be liable to the person purchasing such security from him, who may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any

income received thereon, upon the tender of such security, or for damages if he no longer owns the security.

As to plaintiff's initial purchse of the Knox-Arizona stock, the Court finds insufficient evidence to support defendant's liability under these statutes. When plaintiff bought his shares of Knox-Arizona, he did so upon the representations of his broker John Darling. Plaintiff did not know where the stock originated for sale and apparently did not care. Plaintiff testified repeatedly that he bought the Knox-Arizona stock solely on the basis of what John Darling told him. There is no evidence to link any conduct on defendants' part with plaintiff's decision initially to purchase the Knox-Arizona stock. See, Austin v. Lofts Garder, 657 F.2d 168(8th C 1982) citing St Louis Union Trust Co. v Merrill

Lynch,Pierce, Fenner and Smith, Inc.,562 F.2d 1040,1048(8th C 1977), cert den435 U.S. 925(1978).

Once again, upon the representations of his broker, plaintiff was induced to purchase a common stock option for 100,000 shares of Knox-Arizona. Plaintiff did not have any contact with defendants prior to his decision to buy the option. Plaintiff testified that he thought the option was offered by defendant C.Wallace McPherson, but the evidence further shows that any reason for such a conclusion was due to representations made by John Darling. In fact, the evidence shows the offeror of the option to be Fearon Development Corporation. John Darling handled the payment of the first $20,000 installment(i.e. withdrawing it from plaintiff's Thomson-McKinnon account) and plaintiff never knew who received the

payment. There is insufficient evidence to connect any conduct on the part of defendants with plaintiff's decision to purchase the option and make the first $20,000 payment.

Plaintiff met the defendants for the first time on January 10,1981 at a Fearon Development Corporation shareholder's meeting. It was at this meeting that plaintiff became aware of the connection between defendants and Fearon Development Corporation. Defendant C. Wallace McPherson spoke to the group of shareholders about the need of Fearon Development Corporation to acquire Knox-Arizona in order to market a pressure guage that Fearon Development Corporation was developing .Plaintiff became more involved in the "investment scheme" primarily through the efforts of Richard Laughlin; however, sometime in June,1981,

plaintiff communicated directly with defendant C. Wallace McPherson. First, plaintiff received a letter, then a phone call from defendant C. Wallace McPherson outlining the present status of the proposed acquisition of Knox-Arizona by Fearon Development Corporation. He first wrote plaintiff that the Knox-Arizona deal had fallen through but that a different corporation ,namely Pan-American Energy had been acquired. Shortly after receipt of the letter, defendant C. Wallace McPherson called plaintiff to tell him that Pan-American Energy had not been bought but that instead Fearon Development Corporation had bought Resource Royalties and was also going to form their own Pan American Energy Corporation. Defendant C. Wallace McPherson talked to plaintiff about exercising his option upon payment of

another $20,000) for 200,000 shares of Resource Royalties instead of Knox-Arizona. After talking the propostion over with John Darling and Richard Laughlin, plaintiff decided to exercise his option. In September,1981, Laughlin delivered the stock certificate to plaintiff, as issued by Fearon Development Corporation.

Plaintiff contends that defendants misrepresented and omitted certain material facts concerning the exercise of plaintiff's option and subsequent purchase of Resource Royalties shares. Primarily plaintiff argues that defendants misrepresented themselves as the seller whereas Fearon Development Corporation was the actual seller, that defendants failed to disclose that the monies paid for the shares were never invested in Resource Royalties, and that

defendants failed to disclose that defendant C.Wallace McPherson had been a respondent in administrative hearings in 1972 in Missouri and Oklahoma.

This Court must make two distinct findings in oder to conclude that liability existed under the federal securities claim with regard to the opion to purchase and subsequent purchse of the Resource Royalties shares. First, the Court must determine whether a statement or omitted fact is to be considered material,and then must decide if theres is a causal connection between the derfendants' conduct and plaintiff's damages. Essentially, a statement or omitted fact is considered material if it is substantially likely that a reasonable investor would consider the matter important to his/her decision in making the investment. TSC Industries ,Inc. v.

Northway, Inc., 426 U.S. 438,449(1976); Austin v. Loftsgarden ,at 176. If a misrepresented fact or omission is important depends on whether a reasonable investor would consider it "as significantly altering the total mix of information made available". TSC Industries, at 449; Austin ,at 176.

The Court finds that the alleged misrepresentations/omissions would be material to a reasonable investor, but as stated before, the Court's inquiry does not stop at this determination. Although the evidence before this Court is scant, it is clear that these misrepresentations/omissions were not crucial, in the least, to plaintiff's investment decisions. He never inquired of his broker as to who the seller of these, or any securities was and never complained to anyone that Fearon

Development Corporation was the actual seller of the shares in Resource Royalties. Plaintiff repeatedly testified that he did not care who sold the securities or even what corporate entity he was investing in; plaintiff simply wanted "a piece of the action". There is insufficient evidence to show that plaintiff either relied on these misrepresentations/omissions or that there existed in any way a causal connection between defendants' misconduct and plaintiff's purchses. See Austin at 176;Alton Box Board Co v Goldman,Sachs and Co.560 F.2d 916 (8th C 1977).

Next plaintiff seeks to impose liability on defendants pursuant to Section 409.411 R.S.Mo. Section 409.411 states in pertinent part:

(a) Any person who (1) offers or sells a security in violation of section 409.201(a),409(301),or 409(405(b), or of any rule or order under section 409.403

which requires the affirmative approval of salesliterature before it is used ,or of any condition imposed under section 409.304(d), 409.305(f), or 409.305(g), or (2) offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made not misleading (the buyer not knowing of the untruth or ommission) and who does not sustain the burden of proof that he did no know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security,together with interest at eight perscent per year from the date of payment, costs and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. "Damages" is the amount that would be recoverable upon a tender, less the value of the security when the buyer disposed of it, and interest at eight percent per year from the date of disposition.

Although the Court found the securities in question to have been sold as unregistered securities and without an accompanying prospectus, the plaintiff has fialed to bear the burden of proving

by a preponderance of evidence that the defendans personally sold these securities. No evidence was presented linking defendants as the sellers of the Knox-Arizona shares and plaintiff has admitted that Fearon Development Corporation was the seller of the option to purchase and subsequent stock in Resource Royalties. Plaintiff argues that defendants are liable because they are officers and directors of Fearon Development Cor;oration, but defendants were sued in their individual capacity, not in a corporate capacity.

As for the RICO count, the Court will not find for the plaintiff because he has failed to prove that either or both defendants have been criminally convicted of any of the predicate acts listed in RICO. The "pattern of racketeering activity" alleged by

plaintiff consists of fraudulent misrepresenntations and mail fraud, yet neither of the defendants are alleged ever to have been criminally convicted of any predicate acts of mail fraud. The Eighth Circuit has left open the question of whether a determination of a prior criminal conviction is a necessary prerequisite to a civil RICO cause of action in the recent decision of Alexander Grant and Co. v. Tiffany Industries, Inc., 742 F.2d 408 (8th C 1984). Therefore, this Court has chosen to follow the well-reasoned decision of the Second Circuit in Sedima,S.P.R.L. v. Imrex Co., 741 F.2d 482 (2nd C 1984). The Second Circuit thoroughly examined the statute itself and analyzed the legislative history and previous case law, all of which, it concluded suggested that the availability of civil RICO

remedies be restricted to those potential defendants who have previously been found criminally guilty of committing a predicate offense.Id at 482-510.

The foregoing constitute findings of fact and conclusions of law as required by rule.

Date this 11th day of April ,1985.

EXHIBIT B

A.L. BARNES, APPELLANT
VS
RESOURCE ROYALTIES,INC
APPELLEE

NO. 85-1715

UNITED STATES COURT OF APPEALS
EIGHT CIRCUIT
795 F.2d 1359

The plaintiff, A.L. Barnes , appeals from the district court's judgment in favor of the defendants, C. Wallace and Norma McPherson, in this case involving principally the allegedly fraudulent offer and sale of unregistered securities. For the reasons discussed below, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I.BACKGROUND

Barnes, the purchaser of several securities, initiated this action by filing a twenty one count complaint

against twelve defendants, including the McPhersons. Mr McPherson wa an officer and director of the following corporations. McPherson Enterprises, Fearon Development Corporation, Pan-American Energy Incorporated and Resource Royalties Incorporated.Mrs McPherson was an officer and a director of McPherson Enterprises and Fearon Development. The complaint alleges a breach of employment contract, common law fraud a violation of the Racketeer Influenced and Corrupt Organiztation (RICO) Act and several violations of federal and state securities laws.

The case involves three securities transactions and an alleged employment agreement. The first transaction occurred on December 1, 1980 when barnes purchased through his broker 10,000 shares of Knox Arizona Corporation stock

at $.25 per share. The second transaction occurred on December 20,1989, when Barnes purchsed, again through his broker , an option for 100,000 shares of Knox Arizona common stock at $.40 per share ($20,000) was paid in January, 1981 and $20,000 was paid in JUly 1981). The third transaction occurred in June, 1981 when Barnes acquired 200,000 shares of Resource Royalties common stock in lieu of the 100,000 shares of Knox Arizona as previously offered and sold pursuant to the option. The gravamen of Barnes complaint excluding the breach of contract claim, is that he was fraudulently induced by the defendants to purchase unregistered securities on the pretext that the corporations in which he was investing were developing and marketing investing were developing and marketing new products. The breach of

contract claim involves an alleged agreement between Barnes and Pan American Energy, a wholly owned subsidiary of Resource BRoyalties. Barnes alleges that he and Mr. McPherson, acting on behalf of Pan American, entered into an agreement whereby Barnes would be hired as a project manager.

After what the district court referred to as "a rather chaotic pre-trial period" the court determined that several counts of the complaint had been dismissed, and that Barnes either settled with or secured default judgments against all the defendants except the McPhersons. Barnes v Resource Royalties, Inc.,610 F Supp 499,500(E.D.Mo. 1985) Accordingly the case was tried to the court against only the McPhersons on fewer than all twenty-one counts. McPherson invoked his rights under the Fifth Amendment and

chose not to testify.

The district court included the following counts in its list of those counts that were tried: 2,4,6,8(federal securities law violations), 11 (RICO violation),13,17 and 19 (state securities law violations). With the exception of Count 11, these counts pertain to only the second and third transactions. The court, however, addressed all three transactions in its opinion.

With respect to the first transaction, the district court found that the McPhersons were not the offerors or sellers of Knox Arizona stock, and therefore they could not be held liable under federal or state securities law. With respect to the second transaction, the court found that Fearon Development was the offereor and seller of the option to purschase 100,000 shares of Know

Arizona common stock. The court therefore concluded that the McPhersons could not be liable under federal or state securities law for the second transaction. With respeect to the third transction, the court found that Fearon Development also was the offeror and seller of the Resource Royalties stock. The district court also found that the evidence was insufficient to show that Barnes "either relied on [any] misrepresentations/omissions or that there existed in any way a causal connection between the defendants' misconduct and plaintiff's purchases." 610 F.Supp. at 504. The district court therefore concluded that the McPhersons were not liable under either federal or state securities law for the third transaction. The district court also held that the McPhersons could not be held

liable as "controlling persons" under state law because they were not sued in their corporate capacity. Finally, the district court ruled in favor of the McPhersons on the RICO count because Barnes failed to prove that the "defendants (had) been criminally convicted of any of the predicate acts listed in RICO. Id at 505.

On appeal, Barnes contends that the district court erred in trying the case on fewer than all twenty one counts of the complaint. Barnes also takes issue with the district court's ruling on each of the transactions. We address in detail Barnes contentions in the following discussion Suffice it to say here that we hold that the district court erred in trying the case on fewer than all counts of the caomplaint. We affirm, however the district court's decision with respect to

the first transaction, and reverse and remand the court's decision concerning the second and third transactions. Finally, we reverse the district court's decision on the RICO count and remand for further consideration in light of Sedima, S.P.R.L. v Imrex Co., U.S. ,105 S.Ct 3275,87 L.Ed 2d 346(1985), which was decided after the district court rendered its decision.

II DISCUSSION

The district court excluded the following counts from its list of those that were tried: 1,3,5,7,9,10,12,14,15,16,18,20,and 21. Barnes contends that the district court erred in ruling that these counts were dismissed before trial . Barnes argues that he submitted the case against the McPhersons on all twenty one counts. We agree. The McPhersons are named as

defendants in every count. Barnes did not move to dismiss any of the counts against the McPhersons. The proposed findings fact and conclusions of law submitted to the district court by both parties address all twenty one counts. Therefore, we remaind so that the district court can rule on these conunts in light of our decision.[31] Contrary to Barnes' contention, and as set forth in more detail in our discussion, the district court will not need to render findings and conclusions as to all of those counts.

A. THE FIRST TRANSACTION

With respect to the initial purchase of the 10,000 shares of Knox-Arizona common stock, Barnes' complaint alleges violations of both federal and state secrurities law. Counts 1,3,5,7, and 9 contain the federal law allegations;

Counts 12,14,16, and 18 contain the state law allegations. Although the district court did not include any of these counts in its list of those that were tried, it rendered findings of fact and conclusions of law with respect to all but three (Counts 5,9, and 14). Counts 1 and 3 allege violations of section 12(1) and (2) of the Securities Act of 1933, 15 U.S.C. Section 771(1982). Count 7 alleges a violation of section 10(b) of the Securities Exchange Act of 1934, 15 U.S. C. Section 78j(b) (1982). Section 12(1) prohibits the offer or sale of securities in violation of the registration and prospectus requirements. Section 12(2) prohiibits misrepresentations or omissions of material fact by "any person who offers or sells a security." In essence section 10(b) contains the same prohibition but "in connection with the

purchase or sale of a security." See 17 C.F.R. Section 240.10b-5 (1985). The district Court found that Barnes purchased the initial 10,000 shares of Knox-Arizona stock through his broker "from an unknown seller. Whether the seller was defendant C. Wallace McPherson personally would be unsubstantiated speculation ***" 610 F. Supp. at 502. The district court also found that the securities were unregistered, but concluded that the McPhersons were not liable under sections 12(1), 12(2) or 10(b) because "no evidence [existed] to link any conduct on the [McPhersons'] part with the plaintiff's decision initially to purchase the Knox Arizona stock." Id. at 503.

Barnes ccontends that the finding that he purchased the initial 10,000 shares of stock from an unknown seller is

clearly erroneous. The evidence established that Barnes purchased his shares on December 1,1980. The McPhersons owned 26,246 shares of Knox Arizona stock, and during the month of December they sold 16,000 shares. Two other Knox Arizona shareholders, however, sold 40,000 and 30,000 shares during the same period. Finally, Barnes' broker who was also one of the McPhersons' original codefendants, testified that Knox Arizona stock could only be purchased through McPherson.

Barnes argues that the only logical inference that can be drawn from this evidence in that the McPhersons were the sellers of the 10,000 shares he initially purchased. Appellant's brrief at 29. The district court did not adopt this inference in finding that the seller was "unknown," and we do not believe its

finding is clearly erroneous. Other shareholders were selling their shares at that time. Although we might have reached a different conclusion had we been the trier of fact, we canot say that we are left with a definite and firm conviction that the district court was mistaken. See Anderson v City of Bessmer City, 105 S. Ct. 1504,1511 (19850. Therefore, we affirm the court's decision that the evidence did not establish violations of sections 12(2) and 10(b) with respect to the first transaction. Accordingly, we also affirm the court's decision that the evidence did not establish a violation of state securiteies law as alleged in Counts 12,14,16 and 18. These counts allege several violations of Mo. Rev. Stat.Section 409.411(a) (Supp. 1984).[3]2 Section 409.411(a)(1) prohibits the offer or sale of unregistered securities, the

offer or sale of securities by unregistered brokers or agents , and the offer or sale of securities without first having on file with the commissioner of securities the sales and advertising literature. Subsection (2) is in essence identical to section 12(2) of the Securities Act of 1933. Although the district court did not include these counts in the list of those that were tried, it found that the securities were unregistered and that no sales and advertising literature had been filed with the commissioner. The district court concluded, however, that because the evidence did not show that the McPhersons were the sellers of the first 10,000 shares of Knox Arizona stock, they could not be liable under Section 409.411(a). As wer said, this finding is not clearly erroneous. Therefore, we also

affirm the district court's decision with respect to these state law claims.

In sum, we affirm the district court's decision concerning the first transaction. On remand, the district court shall enter judgment in favor of the McPhersons on Counts 1,3,5,7,9,12,14,16 and 18.[3]

B. THE SECOND TRANSACTION

In his complaint, Barnes consolidates the allegations concerning the second and third transactions -- the offer and sale of the option for 100,000 shares of Knox Arizona stock and the subsequent purchase of 200,000 shares of Resource Royalties in lieu of the Knox Arizona stock. Counts 2,4,6,8,10,13,15,17, and 19 pertain to these two transactions and allege the same violations of federal and state securities law as did the counts

involving the first transaction. Counts 2,4,6,8, and 10 allege violations of federal law. The court rendered findings of fact and conclusions of law with respect to Counts 2,4, and 8. Counts 2 and 4 allege violations of Sections 12(1) and (2) of the 1933 Act. Count 8 alleges a violation of Section 10(b) of the 1934 Act.4

With respect to the offer and sale of the option for 100,000 shares of Knox Arizona stock and the first $20,000 payment, the court found that the offeror of the option was Fearon Development Corporation , not the McPhersons. The McPhersons had no personal contact with Barnes concerning the option. The court also found that Barnes did not know who received the corresponding $20,000 payment. The court concluded that the evidence was insufficient "to connect any

conduct on the part of the [McPhersons] with [Barnes'] decision to purchase the option or make the first $20,000 payment." Consequently, the court did not discuss sections 12(2) and 10(b) with respect to the offer and sale of the option.

On appeal, Barnes condtends that the district court overlooked the McPhersons' liability as "controlling persons." Barnes argues that as officers and directors of Fearon Development, the McPhersons are controlling persons, and therefore pursuant to sections 15 and 20 of the 1933 and 1934 Acts, they are jointly and severally liable for any federal securities law violations committed by Fearon Development. 5 Barnes therefore contends that the McPhersons' lack of personal contact with him is irrelevant.

We agree with Barnes that the district court overlooked the federal controlling person issue. The district court, however, addressed state controlling person liability, but held that the McPhersons were not liable under state law because there were sued in their personal, as opposed to official, capacities. We disagree. Paragraphs 48 and 52 of Barnes' compalaint adequately notified the McPhersons that they were also being sued in their official capcities as "controlling persons," and each count of the complaint incorporates these paragraphs. Accordingly, we reverse this portion of the district court's decision, and remand the issue of whether the offeror and seller of the option, Fearon Development, is liable to Barnes under Federal concerning the second transaction. If the court finds that the

offeror and the seller of the option is liable under federal law, it shall then address the issue of controlling person liability under sections 15 and 20 to determine whether the McPhersons are liable. See Metge v. Baehler, 762 F.2d 621,630-31 (8th Cir. 1985), cert denied, 106 S.Ct. 798 (1986).6 On remand , the district court also shall rule on Counts 6 and 10 with respect to the offer and sale of the option for 100,000 shares of Knox Arizona.

Counts 13,15,17 , and 19 allege violations of state law regarding the offer and sale of the option. The district court included Counts 13,17,1nd 19 in the list of those counts that were tried. These counts allege several violatiokns of Mo. Rev. Stat. Section 409.411. The district court found that the securities were not registered in

violation of sections 409.411 (a)(1) and 409.301. Because the district court found, however, that Fearon Development was the seller of the option, it concluded that the McPhesrsons were not liable. The district court noted that Barnes had argued that the McPhersons were liable as officers and directors of Fearon. The court was unpersuaded by the argument because "the defendants were sued in their individual capacity,not in a corporate capacity." Barnes argues that the district court erred in this respect. As we stated above, we agree. The complaint adequately notifies the McPhersons that they were also being sued in their official capacitites as controlling persons. Accordingly, we remand for reconsideration of the state law issues concerning the offer and sale of the option in light of the

"controlling person" liability pursuant to Mo. Rev. Stat. Section 409.411(b) (Supp. 1984) .8

In sum, we hold that the district court should consider controlling person liability under both federal and state law. On remand, the district court shall consider whether Fearon's conduct violated federal and state law. This will entail a reconsideration of the allegations concerning the second transaction in Counts 2,4,8,10,13,15,17, and 19. If Fearon is liable, the district court must consider whether the McPhersons are liable as controlling persons.

C. THE THIRD TRANSACTION

As we stated above, the allegations concerning the third transaction -- the offer and sale of 200,000 shares of Resource Royalties common stock -- are

consolidated in the counts containing the allegations regarding the second transaction. The district court rendered findings of fact and conclusions of law as to Counts 2 (Section 12(1)), 4(Section 12(2)), 8 (Section 10(b)), and 13,17,and 19 (Section 409.411). The district court found that Fearon Development was the seller of the Resource Royalties stock, and that the stock was neither registered nor sold with the required accompanying prospectus. The court also found that Mr. McPherson corresponded with Barnes by letter and phone concerning fearon's unsuccessful attempt to acquire Knox Arizona Corporation, as well as the other corporations, and concerning the exercise of Barnes' option for the Resource stock in lieu of the Knox Arizona stock.

Barnes alleged that the McPhersons made the following misrepresentations and omissions: (1) They misrepresented themselves as the sellers of securities; (2) they failed to disclose that the money paid for the shares was never invested in Resource Royalties; and (3) they failed to disclose that Mr. McPherson had been a respondent in administrative proceedings in Missouri and Olkahoma. Barnes, 610 F.Supp at 504. The district court determined that these misrepresentations and omissions were material. The district court found, however, that the evidence was insufficient "to show that the plaintiff either relied on these misrepresentations/omissions or that there existed in any way a causal connection between the defendants' misconduct and the plaintiff's purchases.

See Austin v. Loftsgaarden ,675 F.2d 168,176 (8th Cir. 1982);Alton Box Board Co. v. Goldman,Sachs & Co.,560 F.2d 916 [,924 (8th Cir. 1977)]." Barnes, 610 F.Supp. at 504.[39]

On appeal, Barnes contends that the district court erred as a matter of law with respect to section 10(b), and that its finding with respect to section 12(2) is clearly erroneous. We agree with both contentions. Barnes correctly argues that because his section 10(b) cause of action involves primarily a failure to disclose, he was not required to show reliance. See Affiliated Ute Citizens v. United States, 406 U.S. 128,153-54 (1972). In a case "involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material ***" Id. Because the district

court found that the omissions were material, Barnes is entitled to a presumption of reliance. The presumption, however, is rebuttable. See St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner, & Smith,562 F. 2d 1040, 1049(8th Cir. 1977),cert. denied, 435 U.S. 925 (1978). Although the district court discussed some rebuttable evidence, its discussion only addressed the misrepresentation that the McPhersons were the sellers. That evidence did not address the alleged failure to disclose that the money Barnes paid for his Resource Royalties shares was never invested in Resource Royalties and never used to develop new products. That evidence also did not address the McPhersons' failure to disclose that Mr. McPherson was a respondent in previous administrative hearings held in other

states. Although we agree with the district court that the evidence indicated that Barnes "wanted a piece of the action," the evidence also established that Barnes invested his money on the premise that it would be used by the corporations to develop new products. The failure to disclose that the money was not invested in these corporations, and therefore not used by them to develop new products, is sufficient to raise the presumption of reliance. We also believe that the evidence is sufficient to establish the requisite causal connection under Section 12(2). Therefore, we remand for reconsideration the allegations in Counts 4 and 8 concerning the offer and sale of the Resource Royalties stock. On remand , the McPhersons shall be given the opportunity to rebut the section 10(b)

presumption of reliance. The district court shall consider whether Barnes has proved the other elements of the sections 10(b) and 12(2) claims. On remand , the district court also shall consider the other federal and state law allegations concerning the offer and sale of the Resource stock in light of our discussion in Part II B of this opinion.

D. RICO CLAIM

Count 11 contains the RICO allegations. Barnes alleged that the defendants violated the RICO Act when on three separate occasions the defendants fraudulently sold or offered to sell securities to him. This conduct is defined as "racketeering activity" in 18 U.S.C.A. Section 1961(1)(D) (Supp.1985). The district court found that Barnes "failed to prove that *** [the] defendants [had] been criminally

convicted of any of the predicate acts listed in RICO." The district court therefore concluded that Barnes could not prevail on the RICO claim. The district court understandably relied on Sedima,S.P.R.L. v. Imrex Co., 741 F.2d 482,503(2d Cir. 1984), in which the Second Circuit held that a criminal conviction of a predicate act is a prerequisite to recovery in a private action under RICO.

Subsequent to the district court's decision, the Supreme Court reversed the Second Circuit's decision in Sedima, holding that no criminal conviction requirement exists in a private civil RICO action. Sedima, S.P.R.L. v. Imrex Co., 105 S.Ct 3275, 3284 (1985). See also Terre DuLac Association v.Terre DuLac,Inc., 772 F.2d 467 ,472 (8th Vir. 1985), cert. denied, 106 S.Ct. 1460

(1986). To state a claim, a plaintiff must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Sedima, 105 S. Ct. at 3285 (footnote omitted). We hold that Barnes' complaint adequately alleged each of these elements, and therefor he has stated a claim for relief. Consequently, we reverse the district court's decision and remand the RICO issue so that the court can render findings of fact and conclusions of law.

E. COMMON LAW FRAUD AND BREACH OF CONTRACT

Barnes argues that the district court erred in failing to rule on the allegations of common law fraud and breach of employment contract in Counts 20 and 21. We agree. On remand, the district court shall render findings of fact and conclusions of law concerning

these counts.

III CONCLUSION

In conclusion, the district court erred in trying the case against the McPhersons on fewer than all twenty-one counts of the complaint. On remand, the district court will rule on the counts that it did not address at trial. We affirm the district court's decision with respect to the first transaction. The district court's finding that the McPhersons were not the sellers of the 10,000 shares of Knox Arizona stock is not clearly erroneous. Consequently, Barnes is not entitled to recover on those counts concerning this transaction. We reverse and remand the district court's decision concerning the second transaction. The district court failed to consider "controlling person" liability under both federal and state law. We also

reverse and remand the district court's decision concerning the third transaction. The case primarily involves a failure to disclose. Therefore, reliance can be presumed under section 10(b). On remand, the McPhersons shall be given the opportunit to rebut the presumption. The evidence also demonstrates the requisite causal connection under section 12(2). The district court shall reconsider whether the McPhersons are liable under federal and state securities law for the third transaction. We also reverse and remand the district court's decision concerning the RICO claim. Finally, on remand the district court shall also rule on Counts 20 and 21.

Usual court costs assessed against Appellees. (Does not include attorney fees).

FOOTNOTES

1. Although we agree with Barnes, we empathize with the district court. Even plaintiff's counsel was unsure as to which counts were going to be submitted. The twenty-one count complaint is fifty-five pages long and contains 197 numbered paragraphs. Although the McPhersons were included as defendants in each count, they were grouped together with several defendants who were included in approximately one half of the counts, and several others who were included in the other half. Half of the complaint involves the first transaction and the other half involves the second and third transactions, as well as the RICO, common-law fraud, and breach of contract claims. The confusion still exists. During oral argument defendants' counsel stated that his "trial chart" indicated that only half of the counts were going to be tried.

2. Section 409.411(a) provides:

(This section is reproduced in the trial court's opinion).

3. As we have stated, the district court did not address the allegations concerning the first transaction in Counts 5,9, and 14. Because we hold that the district court did not err in finding that McPhersons were not the sellers of the initial 10,000 shares, Barnes is not entitled to recover on these counts as well.

4. Section 12 provides:

(This section is reproduced in the district court opinion)

15 U.S.C. Section 771(1982).Section 10(b) provides:

(This section reproduced in the district

court opinion)

15 U.S.C. Section 78j(b) (19820, See 17 C.F.R. 240.10b-5 (1985).

Count 10, which alleges a violation of Section 29(b) of the 1934 Act, 15 U.S.C. Section 78aa(b) (1982) ,was not included in the district court's list of those counts that were tried. Count 6, which allegs a violation of Section 17(a) of the 1933 Act, 15 U.S.C. Section 77q (1982), was included in the court's list, but no findings of fact or conclusions of law were rendered with respect to this count.

5. Section 15 provides:

Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections 77k or 771 of this title, shall also be liable jointly and severally with and to the same extent as such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

15 U.S.C. Section 77o (1982). Section 20(a) provides:

Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce

the act or acts constituting the violation or cause of action.
18 U.S.C. Section 78t(a).

6. In Metge, the court approved a two-point test used in determining controlling person liability. The plaintiff must establish the following:

First, that the defendant *** actually participated in (i.e. exercised control over) the operations of the corporation in general; then he must prove that the defendant possessed the power to control the specific transaction or activity upon which the primary violation is predicated, but he need not prove that this later power was exercised."(emphasis in the original)Metge, 762 F. 2d at 631 (quoting the district court's opinion).

7. Count 6 alleges a violation of Section 17(a) of the 1933 Act. Although the Supreme Court has expressed no view on the issue, see Eichler v. Berner, 105 S.Ct. 2622,2625 n. 9 (1985), the Eighth Circuit has held that no implied private right of action exists under section 17(a). Shull v. Dain,Kalman & Quail,Inc., 561 F.2d 152,155 and 159(8th Cir. 1977) ,cert. denied,,434 U.S. 1086 (1978). Threfore, on remand the district court is directed to dismiss Count 6.

8. Section 409.411(b) provides:

(b) Every person who directly or indirectly controls a seller liable under subsection (a), every partner, officer, or director of such a seller, every person occupying a similar status or performing similar functions , every employee of such a seller who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale is also liable jointly and severally with and to the same extent as the seller,

unless the non-seller who is so liable sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have knwon, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

9. Barnes contends that the district court erred in requiring a showing of reliance as an element of a Section 12(2) cause of action. Barnes argues that reliance is not required in Section 12(2) action. Although Barnes ' argument is correct, he misreads the district court's finding. The court referred to Section 10(b) and 12(2) respectively when it found that the evidence was insufficient "to show that the plaintiff either relied [Section 10(b)] *** or that there existed in any way a causal connection [Section 12(2)] ." The cases on which the court relied clearly support this interpretation. See Austin, 675 F.2d at 176 (discussing reliance in a Section 10(b) action); Alton Box Board Co., 560 F.2d at 924(Court held that although reliance is not required in a Section 12(2) action, some causal connection must be shown).

Exhibit C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

A.L. BARNES,	)	
	)	
Plaintiff,	)	
	)	
vs	)	No. 83-1582 C(5)
	)	
RESOURCE ROYALTIES, INC.,	)	
	)	
Defendant	)	

ORDER

IT IS HEREBY ORDERED that judgment be entered in favor of the defendants C. Wallace McPherson and Norma McPherson as to Counts 1,3,5,7,9,12,14,16 and 18.

IT IS FURTHER ORDERED that Count 6 be DISMISSED.

IT IS FURTHER ORDERED that judgment be entered in favor of plaintiff and against defendants Fearon Development Corporation, C.Wallace McPherson and Norma McPherson on Counts 2,4,8,13,17 and 19.

IT IS FURTHER ORDERED that judgment be

entered in favor of the defendants on count 11.

IT IS FURTHER ORDERED that judgment be entered in favor of plaintiff and against defendant Fearon Development Corporation of Count 20.

IT IS FURTHER ORDERED that judgment be entered in favor of defendants on Count 21.

IT IS FINALLY ORDERED that all parties affected by this judgment file with the Court memoranda addressing the issue of damages as appropriate in light of the Court's finding of liability on the part of certain defendants on several of the claims brought by plaintiff. Alternatively,,the parties may jointly stipulate the amount of damages forthcoming in this cause. The parties shall be given twenty (20) days to comply with this order.

Dated this 19th day of November,1987.

MEMORANDUM

This matter is before the Court pursuant to the mandate of the Eighth Circuit Court of Appeals which reversed and remanded certain portions of this Court's April 11,1985 opinion. The appellate court affirmed this Court's findings with respect to plaintiff's initial purchase of Knox Arizona stock and direct that , on remand, judgment be entered in favor of the McPhersons as to Counts 1,3,5,7,9,12,14,16, and 18. In addition ,citing the prior Eighth Circuit decision in Shull v. Dain,Kalman and Quail,Inc., 561 F.2d 152,155 and 159 (8th Cir. 1977),cert denied, ,434 U.S. 1086(1978), the appellate court directed that this Court dismiss Count 6 since an implied private cause of action is not recognized in this circuit under

Section17(a) of the Securities Act of 1933. Since the Court has previously dismissed plaintiff's Counts 10 and 15, the remaining analysis here will concern Counts 2,4,8,11,13,17,19,20 and 21. The facts of this case have been adequately addressed in this Court's previous opinion as well as in the decision of the Eighth Circuit Court of Appeals and will not be restated heree. See Barnes v. Resource Royalties,Inc., 610 F.Supp. 499(D.C. Mo. 1985), rev'd 795 F.2d 1359 (8th Cir. 1986).

As the Court of Appeals pointed out in its opinion, plaintiff's complaint consolidates the allegations concerning the second and third stock transactions - the offer and sale of the option for 100,000 shares of Knox-Arizona stock and the subsequent purchase of 200,000 shares in Resource Royalties in lieu of the Knox

Arizona stock. Counts 2,4,8,12,17 and 19 pertain to these two transactions and allege the same violations of federal and state securities law as did the counts involving the first transaction. Counts 2 and 4 allege violations of sections 12(1) and 12(2), respectively ,of the Securities Act of 1933,15 U.S.C. Sections 776(1) and (2)(1982). Count 8 alleges a violation of Section 10(b) of the 1934 Act ,15 U.S.C. Section 78j(b)(1982).

In the Court's previous opinion it held that the offeror of the Knox Arizona option was Fearon Development Corporation, a co-defendant in the case that suffered a default judgment at the time of trial. Apart from Fearon ,however, the Court ruled in favor of the McPhersons because it found that there was insufficient evidence to connect any conduct on their part with plaintiff's

decision to purchase the option and shares. The Eight Circuit, however, highlighted the Court's failure to directly determine Fearon's liability and subsequently the possibility that the McPhersons could be liable as controlling persons of that corporation as provided by Sections 15 and 20 of the 1933 and 1934 Acts. 15 U.S.C. Section 77o(1982) and 18 U.S.C. Section 78t(a). Upon remand and reconsideration, this Court must now amend its earlier holding.

The Court previously found that the common stock of Knox Arizona was not registered as required by both federal and state law and that the option and shares, (for which $20,000.00 was initially paid pursuant to the December 30,1980 agreement) were sold without the required prospectus and that no sales or advertising literature had been filed

with the State of Missouri prior to the sales. Since it is clear that Fearon was the offeror/seller of the securities in question, that defendant is strictly liable to plaintiff under Section 12(1) for violating the registration and other requirements of the 1933 Act. Dahl v. Pinter,787 F.2d 985,988(5th Cir. 1986), reh'g.denied, 794 F.2d 1016(1986),(the dissent attacks the holding on other grounds),cert.granted,107 S.Ct. 1885,951.Ed. 2d 493(April 20,1987).

As to the third transaction, the Court similarly found that the Resource Royalties stock was neither registered nor issued with the required prospectus. No sales or advertising literature was filed with the State of Missouri prior to the sales. Plaintiff purchased 200,000 shares of Resource common stock pursuant

to a common stock option issued by Fearon and it was Fearon that offered and sold the stock. As with the Knox Arizona transaction, Fearon is liable here also to plaitiff under Section 12(1). Counts 13 and 17 state claims under Section 409.411(a)(1) R.S.Mo. for violations of various state securities provisions. These requirements, as set forth in Sections 409.301 and 409.403 R.S. Mo., are similar to the federal registration and filing requirements and were also violated by defendant Fearon.

Count 4 of plaintiff's complaint asserts a claim under Section 12(2) of the Securities Act of 1933 for omissions of material facts made by Fearon in the offer and sale of the Resource Royalties stock. This Court previously found that Fearon was the issuer and seller of both the stock option and the stock itself.

Further, the Court found that in connection with these purchases, Fearon failed to disclose (1) that the money invested by plaintiff was not used to develop and market new products, and (2) that C. Wallace McPherson had been a respondent in administrative hearings held in 1972 in Missouri and Oklahoma for violations of state securities laws. The omissions were found to be material.

In its previous opinion, the Court found no liability under Section 12(2) because it held that there was insufficient evidence to show a causal connection between the alleged misconduct and the sales in question. The Court of Appeals struck down this holding as clearly erroneous and , in doing so, has mandated this Court to enter a finding of the requisite causal connection as set forth in Alton Box Board Co. v. Goldman,

Sachs and Co., 560 F.2d 916,924 (8th Cir. 1977). Upon review of the record and the Court's notes onthis case, is appears likely that the plaintiff was not aware of the omitted information at the time of the transactions. Given the foregoing established elements, the Court must hold that Fearon is liable to plaintiff under Section 12(2). Since Section 409.411(a)(2) R.S.Mo. mirrors Section 12(2) in terms of the elements necessary to establish liability, judgment will be entered against Fearon on Count 19 as well.

Count 8 sets forth a claim undr Section 19(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 for the previously delineated omissions regarding the Resource common stock. The evidence establishes that there were intentional material omissions made with respect to

the sale of securities. On remand, the issue for decision is whether the defendants have produced evidence sufficient to rebut plaintiff's presumed reliance. The record indicates that they have not. Plaintiff has shown that he was told that the money he paid for his Resource Royalties shares would be invested in that company and that it would be used to develop new products. It appears likely that this was not Fearon's intention at the time of the sale. In addition, plaintiff produced evidence that he was never told of Mr. McPherson's prior participation in administrative hearings in Missouri and elsewhere. Defendants have failed to rebut plaintiff's reliance on these demonstrated omissions and misrepresentations and accordingly, the causation element of plaintiff's claim is

esteablished. St. Louis Union Trust Co. v. Merrill Lynch, Pierce,Fenner & Smith,Inc., 562 F.2d 1040,1048(8th Cir. 1977).Affiliated Ute Citizens v. United STates, 406 U.S. 128,154,92 S.Ct. 14567, 31 L.Ed.2d 741(1972). Judgment will be entered against Fearon as to Count 8.

CONTROLLING PERSON LIABILITY

Given Fearon Development Corporation's direct liability to plaintiff under Counts 2,4,8,13,17 and 19, it is necessary to consider Norma and C. Wallace McPherson's potential liability as controlling persons of the corporation under both federal and state law.

In his complaint, plaintiff alleges that the McPhersons were officers and directors of Fearon and the evidence adduced at trial readily supports this contention. It is settled that directors

of a corporation may be found liable as controlling persons under both the Securities Act of 1933 and the Securities Exchange Act of 1934 without having actively participated in the specific activity upon which the corporation's violation is based. Metge v. Baehler,762 F.2d 621,631 (8th Cir. 1985). The two-point test approved in Metge for determining controlling person liability requires the plaintiff to establish the following:

> [F]irst, that the defendant *** "actually participated in (i.e., exercised control over) the operations of the corporation in general; then he must prove that the defendant possessed the power to control the specific transaction or activity upon which the primary violation is predicated, but he need not prove that this later power was exercised."

Metge,762 F.2d at 631,(emphasis in original).[31] Applying the Metge test to the evidence before the Court, it appears

that both C. Wallace and Norma Mc²Pherson must be held liable as controlling persons of Fearon.

While there is not a great deal of evidence to show that Nortma McPherson participated int the operations of the corporation other than her signature on a Fearon stock certificate and her attendance at Fearon stockholders' meetings, there was no evidence produced at trial to rebut the inference of her participation. Further, as to the requirement that a defendant possess the power to control the specific transaction upon which the primary violation is based, her status as a director of Fearon establishes a prima facie showing that she was a controlling person. American General Insurance Co. v. Equitable General Corp., 493 F.Supp. 721,752 (D.C. Va. 1980). While it appears that Mrs.

McPherson probably did not influence the direction of the corporation to the extent that her husband did, the fact that she was a director and an active officer of Fearon suggest that she probably could have altered the direction of the management and policies of the company. As to C. Wallace McPherson, the evidence establishes clearly that he both participated in the operations of the corporation in general and possessed the power to control the specifice transactions at the heart of this lawsuit. Neither defendant established a good faith defendse to controlling person liablility undr either Seciton 15 of the 1933 Act or Section 20 of the 1934 Act.

Under Missouri law, the McPhersons' liability is even bore pronounced. Section 409.411(b) R.S. Mo., (the Missouri Uniform Securities Act),provides

that every person who directly or indirectly controls a seller liable under Section 409.411(a), every partner, officer or director of such seller every person occupying a similar status or performing similar functions, and every employee of such a seller who materially aids in the saile is liable "jointly and severally" with and to the same extent as the seller. As with the federal statutes, the defendants have not sustained their burden of proof that they did not know, and in the exercise of reasonable care, could not have known, of the circumstances giving rise to Fearon's liability. Accordingly , the Court finds the McPhersons liable as controlling persons of Fearon under Counts 2,4,8,13,17 and 19.

RICO COUNT.

Count 11 of plaintiff's complaint

asserts a claim under 18 U.S.C. Section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO). In order to prevail on this claim, plaintiff must establish that the defenndants were associated with an enterprise which was engaged in, or the activities of which affect, interstate or foreign commerce to conduct or participate , directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. 18 U.S.C. Section 1962(c). The elements of primary RICO liability have been synthesized by the juriciary to require "(1) conduct (2) of an enterprise (3) through a pqatern (4) of racketeering activity." Sedima ,S.P.R.L. v. Imrex Co., 105 S.Ct. 3275,3284(1985), Superior Oil Co. v. Fulmer,785 F.2d 252,255 (8th Cir. 1986).

A review of the evidence in this

case establishes that the first two elements have been proven. Fearon Development Corporation was an enterprise with a separate and distinct economic existence, Saine v. A.I.A.,Inc., 582 F.Supp. 1299 (D.C. Colo. 1984), United States v. Lemm,680 F.2d 1193,1198(8th Cir. 1982), cert. denied, 459 U.S. 1110 (1983) , and the McPhersons were involved in the conduct of its affairs to a significant degree. Bennett v. Berg, 710 F.2d 1361,1364 (8th Cir. 1983). As to the requirement of "racketeering activity," 18 U.S.C. Section 1961(1)(d) brings "fraud in the sale of securities" within the ambit of the RICO definition. Regarding the requirement that there be a "pattern" of racketeering activity,,however, the paliantiff has not prevailed.

In Superior Oil Co. v. Fulmer, 785

F.2d 252 (8th Cir. 1986), the Eighth Circuit Court of Appeals thoroughly discussed the parameters of the "pattern" requirement and held that several related acts of mail and wire fraud as part of a single scheme to divert natural gas from Superior Oil's pipeline did not amount to a pattern of racketeering activity. There was no evidence suggesting that such activities had occurred previously or that the individuals involved were engaged in other criminal activities. Quoting from an earlier district court opinion, the Court held that "[i]t places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a 'pattern of racketeering activity.' " Id. at 257. See also, Holmberg v. Morrisette, 800 F.2d 205,210 (8th Cir. 1986), H.J., Inc. v. Northwestern Bell,(8th Cir., slip op.

87-5121, Sept. 22,1987).

In the case at bar, there were two instances of fraud brought about by Fearon. The first occurred in relation to plaintiff's purchase on December 30,1980 of an option for 100,000 shares of Knox-Arizona common stock. Plaintiff paid $20,000.00 in January of 1981 and an additional $20,000.00 in July of 1981 pursuant to the December agreement. While this Court and the Court of Appeals have characterized plaintiff's subsequent acquisition of 200,000 shares of Resource Royalties common stock in lieu of the Knox Arizona shares as a separate transaction, for purposes of the "pattern" requirement of RICO the Court considers both transactions to be part of a fraudulent scheme - albeit a scheme that underwent some strategic alterations as it developed. Plaintiff was induced to

buy into a company that was said to be developing a profitable new line of products. The representations and omissions surrounding this sale were practically identical to those associated with the subsequently sale of Resource Royalties stock - a company that was touted as the new corporate receptacle of what had been Knox Arizona's money-making products. In short, while plaintiff may have been induced to enter into separate agreements (or to amend a prior agreement) the entire chain of events appears to constitute "a single fraudulent scheme". Ornest v. Delaware North Companies, Inc., No. 86-2042 (8th Cir., May 8,1987).

Further, although there was some evidence to show that Fearon may have violated various state and federal registration requirements with regard to

its sale of securities to other individuals, there was no evidence that the defendant had committed fraud with respect to anyone other than the plaintiff. While it is possible that misrepresentations and material omissions were made to others , the record is silent on this point. The Court , therefore, will hold that the plaintiff has not established a pattern of racketeering activity and may not recover under the Racketeer Influenced and Corrupt Organizations Act.

COUNTS 20 AND 21.

Count 20 states a claim for common law fraud also relating to the sale of the option and the common stock of Resource Royalties, For reasons outlined previously in this opinion and in the Court's opinion, the Court finds in favor of the McPhersons and against Fearon

Development Corporation as to actual damages only. Such damages will be determiend at a later time.

Count 21 states a claim for common law fraud against Pan-American Energy, Inc. and C. Wallace McPherson with respect to an employument agreement with plaintiff. After reviewing the evidence adduced at trial as well as certain documents tending to establish the contract in question, the Court cannot find that it is more likely than not that plaintiff was defrauded in this instance. Judgment will be entereed in favor of the defendants on this count.

Dated this 19th day of November, 1987.

FOOTNOTES

1. The Metge test was adopted in conjunction Section 15 of the Securities Act of 1933,15 U.S.C. Section 77o (1982) which provides:
(This section reproduced in the first opinion of the Court of Appeals in Exhibit B).
Section 20 of the Securities Act of

1934,18 U.S.C. Section 78t(a) employs somewhat different language that its 1933 Act counterpart:

> Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

EXHIBIT D
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

A.L.BARNES,

Appellee,

v

C.Wallace McPherson and Norma J. McPherson,

Appellants.

PER CURIAM.

This action arises out of three securities purchases made by A.L. Barnes in 1980 and 1981.[3]1 Barnes filed a twenty-one count complaint against twelve defendants, including the McPhersons. The complaint alleged breach of employment contract, common-law fraud, a RICO violation, and several violations of federal and state securities law. The suit was eventually settled against all defendants except the McPhersons.

After a bench trial, the district court[3]2 found in favor of the McPhersons. See Barnes v. Resource Royalties, Inc., 610 F.Supp. 499 (E.D. Mo. 1985). Barnes appealed to this court, which affirmed the district court's finding of no liability as to the first transaction, but reversed and remanded for further consideration with regard to the second and third transactions and the RICO claim. See Barnes v. Resource Royalties, Inc., 795 F.2d 1359 (8th Cir. 1986). On remand, the district court found in favor of Barnes on counts two, four and eight (federal securities law violations), thirteen, seventeen and nineteen (state securities law violations), and twenty (common-law fraud). See Barnes v. Resource Royalties, Inc., slip op. 83-1582 (E.D. Mo. November 9,1987). The McPhersons appeal, and we affirm the

district court's decision in favor of Barnes. While we find no error in the thorough and well-reasoned opinion of the district court, we shall address briefly the "controlling person" and statute of limitations issues raisedby the McPhersons.[3]3

The McPhersons argue that the district court erred in finding that the McPhersons were controlling persons of Fearon Development Corporation under both federal and state law. They allege that the record is devoid of evidence that Norma McPherson participated to any significant extent in corporate activities or that she had any knowledge or control of the transactions in question. While the McPhersons admit that C. Wallace McPherson was actively involved in the corporation's activities, they claim that he did not have as much

control as they thought he had -- that he was a victim of fraud, not the perpretrator.

The law of this circuit clearly holds that directors of a corporation may be found liable as controlling persons without having actively participated in the specific activity which was the basis for the corporation's violation. Metge v. Baehler, 762 F.2d 621,631 (8th Cir. 1985). Metge establishes a two-point test for determining controlling person liability. A plaintiff must prove:

> [F]irst , that the defendnat *** actually participated in (i.e., exercised control over) the operations of the corporation in general; then he must prove that the defendant possessed the power to control the specific transaction or activity upon which the primary violation is predicated, but he need not prove that this later power was exercised.'

Metge,762 F.2d at 631 (quoting Stern v. American Bankshares Corp., 429 F.Supp.

818 (E.D. Wis. 1977)). With respect to the requirement that a defendant possess the power to control a specific transaction, we agree with the district court that status as a director establishes a prima facia showing that a defendant was a controlling person. See American General Insurance Co. v. Equitable General Corp., 493 F.Supp. 721,752 (D.C. Va. 1980).

Both Norma and C.Wallace McPherson were officers and directors in Fearon Corporation. As secretary of the corporation, Norma McPherson regularly participated in corporate activities,including attending board meetings,signing minutes of those meetings, and signing stock certificqtes. As president, C.Wallace McPherson participated in general corporate operations and clearly possessed the

power to control the specific transactions at the heart of this lawsuit. After examining the record, we find no clear error in the district court's conclusion that the McPhersons were controlling persons for the purpose of both federal and state law.

The McPhersons also argue that Barnes' claims are barred because applicable statutes of limitations had run before Barnes filed suit. The two securities transactions at issue here occurred on December 30,1980 and July 1, 1981. Barnes filed his complaint on July 1,1983. While the evidence is unclear as to the exact date Barnes discovered the fraud, there is no evidence that he made the discovery before the last transaction on July 1,1981.

We find that Barnes timely filed his section 10(b) claims. With respect to the

section 10(b) claim, the statute of limitations is two year years from the date of discovery of the alleged fraud. Vanderboom v. Sexton, 422 F.2d 1233 (8th Cir. 1970). Here, Barnes discovered the fraud sometime after July 1,1981, and the action was filed July 1,1983, within the two-year period.

Barnes' state law claims are subject to a statute of limitations of two years from the contract of sale. Mo. Rev. Stat. Section 409.411(e). Barnes made his last payment for the purpose of acquiring Resource Royalties stock on July 1,1981, and did not receive a certificate for shares of stock until September 1981. These events are within the two-year period set forth in the statute.

Barnes' claims under sections 12(1) and 12(2) of the Securities Act are subject to one-year statutes of

limitations. A section 12(1) action must be broughjt within one year of the violation upon which it is based, but not more than three years form the date the security is offered to the public. 15 U.S.C. Section 77m. A section 12(2) action must be brought within one year of discovery of the untrue statement, but not more than three years after the sale.

Id. Although the three-year outer limitations period is not at issue her, it is not clear that Barnes' claims were timely filed under the one-year limits. We find, however, that the one-year statutes of limitations were tolled until August 1982,,when Barnes finally confirmed his suspicions that the securities transactions at issue were illegal under Missouri -- and possibly federal -- law. The defendants to Barnes' Lawsuit fraudulently concealed what was

really going on with the investments and Barnes, despite his due diligence, did not discover the violations until August 1982. Using this date as the beginning of the limitations period, Barnes' federal securities claims are timely.

Accordingly we affirm.

Date of Judgment :July 31,1989
Mandate issued 9/20/89

FOOTNOTES

1. Because the facts underlying this case are set forth in great detail in previous decisions, we see no need to restate them here. See Barnes v Resource Royalties, Inc., 610 F.Supp. 499 (E.D. Mo. 1985), aff'dd in part and rev'd in part, 795 F.2d 1359 (8th Cir. 1986), on remand slip op. 83-1582 (E.D. Mo. November 19,1987).

2. The Honorable Stephen N. Limbaugh, United Stqates District Judge for the Eastern District of Missouri.

3. The McPhersons raise seven additional issues in their brief, all of which we find to be without merit.

EXHIBIT E
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

A.L.BARNES,

APPELLEE,

VS

C.WALLACE MCPHERSON, ET AL.,

APPELLANTS

Appellants' suggestion for rehearing en banc has been considered by teh court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

September 7,1989.